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No. 01-583

In the Supreme Court of the United States

DANIEL JAMES FOWLIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a defendant who alleges that his attorney labored under a conflict of interest in violation of the Sixth Amendment must show both an actual conflict of interest and an adverse effect on performance.

2. Whether petitioner established that his counsel's alleged conflict of interest adversely affected his performance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B2-B5) is unreported, but the judgment is noted at 172 F.3d 877 (Table). The order of the district court (Pet. App. C6-C12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1999. The petition for rehearing was denied on June 26, 2001 (Pet. App. A1). The petition for a writ of certiorari was filed on September 24, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848; conspiring to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846; eight counts of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); conspiring to defraud the United States, in violation of 18 U.S.C. 371; and four counts of failing to report currency transportation, in violation of 31 U.S.C. 5316 and 5322(a) and (b). He was sentenced to 30 years' imprisonment and fined $1 million. Pet. App. C38. The court of appeals affirmed petitioner's conviction on each count except the drug conspiracy count, which it vacated. See 24 F.3d 1059 (9th Cir. 1994); 24 F.3d 1070 (9th Cir. 1994). This Court denied the petition for a writ of certiorari. 513 U.S. 1086 (1995). Thereafter, petitioner collaterally attacked his conviction under 28 U.S.C. 2255. The district court denied the motion, Pet. App. C6-C12, and the court of appeals affirmed, *id.* at B2-B5.

1. Between 1981 and 1986, petitioner led an organization that distributed more than 30 tons of marijuana throughout the United States and Canada. Gov't C.A. Br. 2. The marijuana was smuggled into the United States from Mexico. Petitioner then distributed the marijuana from his ranch in San Juan Capistrano, California, a series of warehouses in Orange County, California, and San Antonio, Texas. *Id.* at 3-4. In March 1985, while petitioner was in Mexico, local law enforcement officers conducted a search of petitioner's ranch. *Id.* at 4. The search uncovered marijuana residue, an Uzi semiautomatic firearm, and other drug-related

evidence. Petitioner was extradited from Mexico in order to stand trial.

2. Several months after petitioner was indicted, a grand jury returned a related 25-count indictment charging his son, Gus Fowlie, and others with conspiring to possess marijuana with intent to distribute it and related offenses. Gus Fowlie's indictment covered the same conduct with which petitioner was charged. The indictment named petitioner as an unindicted co-conspirator. Pet. App. C16.

Attorney James D. Riddet represented Gus Fowlie. Pet. App. C16. Riddet negotiated an agreement with the government pursuant to which Gus Fowlie pleaded guilty to one count of conspiracy to possess marijuana with intent to distribute it. As a condition of the agreement, Gus Fowlie implicated petitioner in the conspiracy, stating that his role in the conspiracy was "assisting in the transportation, storage, packing and distribution of marijuana at the direction of [petitioner] and others." *Id.* at C17 (citation omitted).

At Gus Fowlie's sentencing, Riddet minimized Gus Fowlie's criminal culpability by assigning responsibility for his participation in the marijuana conspiracy to petitioner. Riddet told the court that "[i]t would be foolish to dispute the fact that [petitioner] was running an extremely large marijuana organization. And what concerns me [as] counsel for Gus Fowlie is that that might rub over onto Gus Fowlie who was indeed a minimal participant, nothing more than unfortunately the son of [petitioner]." Riddet made other statements asserting petitioner's guilt. Pet. App. C17-C18 (citations omitted).

After Gus Fowlie was sentenced, petitioner appeared before the same district judge who had presided over Gus Fowlie's case. Pet. App. 2. Petitioner was initially

represented by appointed counsel, but later he retained Michael Pancer and Pancer selected Riddet as local counsel. Riddet filed a motion seeking authorization for him and Pancer to substitute for appointed counsel. The court disqualified Pancer because he had previously represented a witness the government planned to call against petitioner. Thereafter, Riddet filed another motion to substitute himself as counsel. In support of the motion, Riddet attached conflict waivers signed by petitioner and Gus Fowlie. The court agreed to Riddet's substitution, finding that Riddet did not labor under any conflict of interest. Pet. App. C18-C20. Petitioner was convicted of operating a continuing criminal enterprise and numerous related offenses, and those convictions were affirmed.

3. Petitioner collaterally attacked his convictions under 28 U.S.C. 2255, arguing that Riddet had a conflict of interest based on Riddet's prior representation of Gus Fowlie and Riddet's acknowledgment at Fowlie's sentencing that petitioner was guilty of participating in the charged drug conspiracy. He argued that Riddit's acknowledgment prevented Riddet from arguing petitioner's innocence because doing so would have "forc[ed] [Riddet] to take inconsistent positions before the same judicial officer." Pet. App. C10.

The district court denied petitioner's conflict of interest claim. Pet. App. C10-C12. The court pointed out that Riddet had consistently argued in this case that petitioner was a legitimate businessman, that petitioner was innocent of the charges, and that others were responsible for the conspiracy. *Id.* at C10-C11. The court concluded that petitioner had "failed to establish that a[n] ethical dilemma existed, let alone that a conflict of interest for constitutional purposes arose." *Id.* at C11. The court went on to hold that, even if there

were a conflict, petitioner had failed to show that the conflict adversely affected Riddet's performance. *Ibid.*

4. The court of appeals affirmed. Pet. App. B2-B5. The court held that petitioner had voluntarily waived any conflict of interest based on Riddet's prior representation of his son. *Id.* at B3-4. The court concluded, however, that petitioner's waiver did not reach his claim that Riddet was self-conflicted as a result of his statements to the district court at Gus Fowlie's sentencing. The court reasoned that nothing in the record suggested that petitioner was aware that Riddet had "argued [petitioner's] own guilt during the course of that representation." *Id.* at B5 n.2. The court of appeals further held that Riddet's statements at the sentencing hearing created an actual conflict of interest. *Id.* at B4. The court nonetheless rejected petitioner's conflict-of-interest claim on the ground that petitioner failed to show that the conflict adversely affected Riddet's performance. *Id.* at B5. The court explained that Riddet had "argued [petitioner's] innocence, vigorously cross-examined the government's witnesses, and attempted to shift the blame to several viable suspects." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 11-19) that where the trial court fails to inquire into a conflict about which it knows or reasonably should know, a defendant should be afforded relief on collateral review merely by showing that his attorney had an actual conflict, regardless of whether the conflict adversely affected the attorney's performance. That issue is currently before the Court in *Mickens* v. *Taylor*, No. 00-9285 (argued Nov. 5, 2001). The Court should therefore hold the petition in this case pending the decision in *Mickens*.

2. Petitioner also contends (Pet. 22) that he demonstrated that Riddet's alleged conflict of interest adversely affected his performance because it caused Riddet to limit his defense to challenging the government's evidence and to refrain from offering evidence which assumed petitioner's innocence. In particular, he claims (Pet. 22-29) that Riddet's alleged conflict prevented him from offering evidence that the items found at petitioner's ranch belonged to the ranch manager, Wade Westmoreland, that Westmoreland was the manager of the drug enterprise, that petitioner left his ranch a week before the search, and that petitioner had an innocent explanation for a large sum of money sent to him by Joseph Cooper, his bookkeeper and "right hand man."

As the courts below found, however, Riddet did not merely argue that the government's evidence was insufficient to establish guilt beyond a reasonable doubt. He portrayed petitioner as a "legitimate businessman" (Pet. App. C11), "argued [petitioner's] innocence, vigorously cross-examined the government's witnesses, and attempted to shift the blame to several viable suspects." *Id.* at B5. In those circumstances, there is no basis for overturning the findings of both courts below that petitioner failed to demonstrate that Riddet's alleged conflict adversely affected his performance. In any event, that fact-bound issue does not warrant this Court's review.

CONCLUSION

With respect to question one, the petition for a writ of certiorari should be held pending the decision in *Mickens* v. *Taylor*, No. 00-9285 (argued Nov. 5, 2001), and then disposed of as appropriate in light of that decision. With respect to question two, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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